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EXAMINER				
SASAN, ARADHANA				
ART UNIT		PAPER NUMBER		
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/501,126

**Applicant(s)**

FOOR ET AL.

**Examiner**

ARADHANA SASAN

**Art Unit**

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 20 October 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 2, 4-7, 9, 11, 17, 18, 20, 21 and 24-31 is/are pending in the application.
- 4a) Of the above claim(s) 2, 4-5, 9, 11, 17, 18, 20, 21, and 24-28 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 6, 7 and 29-31 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Restriction Response*

1. Applicant's election with traverse of Group III (claims 1, 6 and 7) and the specific combination of the compound of claim 17 as a species of component (a), famoxadone as a species of component (b2), and metalaxyl as a species of component (b6) in the reply filed on October 20, 2008 is acknowledged.

In the Lack of Unity set forth August 20, 2008 the examiner argued that Claims 1, 2, 4, 5 & 17 did not share a special technical feature with claims 6, 9, 11 and 17-28. This grouping of claims was necessitated by the prosecution which had occurred prior to applicant's petition of the holding of lack of unity of invention. However, prior to responding to applicant's most recent traversal a reconsideration of the original Lack of Unity is appropriate.

A determination of Lack of Unity is made in accordance with PCT rules:

13.2 Circumstances in Which the Requirement of Unity of Invention Is to Be Considered Fulfilled

Where a group of inventions is claimed in one and the same international application, the requirement of unity of invention referred to in Rule 13.1 shall be fulfilled only when there is a technical relationship among those inventions involving one or more of the same or corresponding special technical features. The expression "special technical features" shall mean those technical features that define a contribution which each of the claimed inventions, considered as a whole, makes over the prior art.

*Rule 13.2; AI Annex B, Part 1(b)*

10.02 Whether or not any particular technical feature makes a "contribution" over the prior art, and therefore constitutes a "special technical feature," is considered with respect to novelty and inventive step. For example, a document discovered in the international search shows that there is a presumption of lack of novelty or inventive step in a main claim, so that there may be no technical relationship left over the prior art among the claimed inventions involving one or more of the same or corresponding special technical features, leaving two or more dependent claims without a single general inventive concept.

Claim 1 as originally presented is reproduced below:

1. (Original) A composition for controlling plant diseases caused by fungal plant pathogens comprising:

(a) at least one compound of Formula I, N-oxides and agriculturally suitable salts thereof



wherein

A is a substituted pyridinyl ring; B is a substituted phenyl ring;

W is C=L or SO<sub>n</sub>; L is O or S;

R<sup>1</sup> and R<sup>2</sup> are each independently H; or C<sub>1</sub>-C<sub>6</sub> alkyl, C<sub>2</sub>-C<sub>6</sub> alkenyl, C<sub>2</sub>-C<sub>6</sub> alkynyl or C<sub>3</sub>-C<sub>6</sub> cycloalkyl, each optionally substituted;

R<sup>3</sup> is H; or C<sub>1</sub>-C<sub>6</sub> alkyl, C<sub>2</sub>-C<sub>6</sub> alkenyl, C<sub>2</sub>-C<sub>6</sub> alkynyl, C<sub>3</sub>-C<sub>6</sub> cycloalkyl, C<sub>2</sub>-C<sub>10</sub> alkoxyalkyl, C<sub>2</sub>-C<sub>6</sub> alkylcarbonyl, C<sub>2</sub>-C<sub>6</sub> alkoxy carbonyl, C<sub>2</sub>-C<sub>6</sub> alkylaminocarbonyl or C<sub>3</sub>-C<sub>8</sub> dialkylaminocarbonyl;

and n is 1 or 2; and

(b) at least one compound selected from the group consisting of

(b1) alkylenebis(dithiocarbamate) fungicides;

(b2) compounds acting at the bc1 complex of the fungal mitochondrial respiratory electron transfer site;

(b3) cymoxanil;

(b4) compounds acting at the demethylase enzyme of the sterol biosynthesis pathway;

(b5) morpholine and piperidine compounds that act on the sterol biosynthesis pathway;

(b6) phenylamide fungicides;

(b7) pyrimidinone fungicides;

(b8) phthalimides; and

(b9) fosetyl-aluminum.

It is difficult to discern what the possible "special technical feature" of claim 1 is as it could reside in either the compounds of Formula I or in the combination of compounds of Formula I with any one of (b1)-(b9) or in the combination of compounds of Formula I with more than one of (b1)-(b9). This latter possibility appears unlikely as no particular combination comprising at least two of (b1)-(b9) is recited. The compounds of Formula I are known in the art and thus said

compounds cannot constitute the "special technical feature" which links the claims. Clearly within the scope of claim 1 are binary compositions of the compounds of Formula I and one of (b1)-(b9). Berezna et al. (US 6,066,638) at columns 68-70, especially at column 69 lines 46-49, clearly suggests employing combinations of fungicides. Included in the suggested fungicides for use in combinations are famoxadone (see column 70) and metalaxyl (column 69). The compounds of Berezna et al. appear to fall into the (b7) group of applicant's claim 1. Clearly specific combinations of (b7) and (b2) or (b7) and (b6) were known in the prior art as well as the more general suggestion to combine fungicides. On this basis it would have been obvious to have combined any of the compounds of Formula I with any of (b1)-(b9) and claim 1 lacks a "special technical feature."

In evaluating the originally presented claims the examiner set forth groups which comprised a compound of Formula I and shared one of (b1)-(b9). It is noted that in the Lack of Unity set forth April 17, 2007 that the examiner did not present an art based lack of unity.

In the response of May 9, 2007:

Applicants elect Group II (claims 1, 2 and 6-11, all partially, and claims 4 and 5 both complete). However, Applicants respectfully request reconsideration of the division of claims. Applicants note that Groups I through IX all involve combinations that include a component (a) compound; and Applicants submit that a search for advantageous combinations involving component (a) compounds might provide for efficient examination of all of these groups. At any rate, Applicants submit that Claim 7 should be completely included in Group II since at least one compound selected from (b2) is included in the composition.

The examiner did not find the traversal persuasive and prosecution proceeded.

In the response of September 19, 2007 claim 1 was amended:

1. (As amended 09/19/2007) A composition for controlling plant diseases caused by fungal plant pathogens comprising:
  - (a) at least one compound of Formula I, N-oxides and agriculturally suitable salts thereof



wherein

A is a substituted pyridinyl ring; B is a substituted phenyl ring;

W is C=L or  $SO_n$ ; L is 0 or S;

R<sup>1</sup> and R<sup>2</sup> are each independently H; or C<sub>1</sub>-C<sub>6</sub> alkyl, C<sub>2</sub>-C<sub>6</sub> alkenyl, C<sub>2</sub>-C<sub>6</sub> alkynyl or C<sub>3</sub>-C<sub>6</sub> cycloalkyl, each optionally substituted;

R<sup>3</sup> is H; or C<sub>1</sub>-C<sub>6</sub> alkyl, C<sub>2</sub>-C<sub>6</sub> alkenyl, C<sub>2</sub>-C<sub>6</sub> alkynyl, C<sub>3</sub>-C<sub>6</sub> cycloalkyl, C<sub>2</sub>-C<sub>10</sub> alkoxyalkyl, C<sub>2</sub>-C<sub>6</sub> alkylcarbonyl, C<sub>2</sub>-C<sub>6</sub> alkoxy carbonyl, C<sub>2</sub>-C<sub>6</sub> alkylaminocarbonyl or C<sub>3</sub>-C<sub>8</sub> dialkylaminocarbonyl;

and  $n$  is 1 or 2; and

(b) at least one compound selected from the group consisting of (b2) compounds acting at the  $bc_1$  complex of the fungal mitochondrial respiratory electron transfer site;

and optionally at least one compound selected from the group consisting of

(b1) alkylenebis(dithiocarbamate) fungicides;

(b3) cymoxanil;

(b4) compounds acting at the demethylase enzyme of the sterol biosynthesis pathway;

(b5) morpholine and piperidine compounds that act on the sterol biosynthesis pathway;

(b6) phenylamide fungicides;

(b7) pyrimidinone fungicides;

(b8) phthalimides; and

(b9) fosetyl-aluminum.

In addition applicant continued his traversal of the holding of lack of unity and the examiner maintained her position.

Applicant petitioned the holding of lack of unity (**March 3, 2008**) which petition was granted in part:

The petition filed under 37 CFR 1.144 on 3 March 2008 is GRANTED to the extent that applicant has not been properly afforded an opportunity to select an invention present in original claims 6, 7, and in newly added claims 21-23 and 26. (page3, June 9, 2008)

In response to the petition decision the examiner issued a new lack of unity.

Art Unit: 1615

Applicant elected Group III and has traversed this holding of lack of unity (October 20, 2008):

Applicants respectfully disagree that the combination of component (a) and component (b2) would have been obvious to one of ordinary skill in the art over U.S. Patent 6,503,933, U.S. Patent 6,066,638 and Pesticide Science 55:105-118 (1999); and accordingly, object to all claim groupings which rely on an assertion to the contrary. Applicants also disagree with making this issue a matter for resolution as a part of the restriction process rather than examination. Applicants submit that Col. 68, lines 58-64 of Berezna et al. does not suggest combining famoxadone, or any other (b2) compound, with a component (a) compound; and that instead this disclosure is limited to a discussion of combinations including certain fungicidal fused-ring pyrimidinones that are not structurally related to component (a) compounds of the present invention that include both a substituted pyridinyl ring and a substituted phenyl ring that are structurally separated from each other. Applicants further submit that while Col. 3, lines 29-32 of Moloney et al. indicates generally that the compositions can comprise other actives, it does not specifically disclose famoxadone or any other (b2) compound or suggest that (b2) compounds should be combined. Moreover, Applicants submit that Moloney et al. does not disclose or fairly suggest that combinations with (b2) compounds will provide advantageous results as disclosed by Applicants. Applicants submit that the Moloney et al. passage merely suggests to one of ordinary skill that the compositions could be formulated with other actives or could be formulated without other actives, without suggesting whether either alternative should be selected. Applicants submit that this cannot be fairly characterized as making obvious advantageous combinations involving component (a) and component (b2) of the present claims, especially advantageous combinations involving the compound of Claim 17 and famoxadone. Applicants submit that if the Examiner maintains this assertion of obviousness, it is clearly an issue Applicants should be afforded an opportunity to appeal; and all claim groupings relying on this assertion are objected to as relying on a matter which remains unresolved. Accordingly, Applicants object to all separate claim groupings that rely on this assertion of obviousness.

It would appear that applicant views the combination of a compound of Formula I and (b) at least one compound selected from the group consisting of (b2) compounds acting at the  $bc_1$  complex of the fungal mitochondrial respiratory electron transfer site as being a "special technical feature." In the preceding discussion of claim 1 it was noted that combinations of fungicides were known and suggested in the art. It is correct that amended claim 1 now requires that the combination included a compound of Formula I and a compound from (b2), specifically famoxadone. However, it is equally clear that the art specifically suggests combining fungicides. Applicant urges that the prior art does not teach that it would be advantageous to combine fungicides and that Maloney fails to suggest a specific combination. This is not persuasive in view of Berezna et al.:

Art Unit: 1615

(74) In certain instances, combinations with other fungicides having a similar spectrum of control but a different mode of action will be particularly advantageous for resistance management.

This clearly suggests combinations with the compounds of Bereznak et al. and more generally suggest to one of ordinary skill in the art that it is routine to combine any combination of fungicides exhibiting similar activity. It is further noted that Bereznak et al. teaches combinations containing famoxadone.

With regards to applicant's request that he should be afforded an opportunity to appeal this holding of lack of unity applicant is referred to 5 USC §701-706. It is clear that a final agency decision on a petitionable matter can be appealed. Thus, applicant is not being denied any opportunity to appeal.

Applicant states:

Applicants also disagree with making this issue a matter for resolution as a part of the restriction process rather than examination. (pages 8-9, response of October 20, 2008)

Applicant's disagreement is noted. However, applicant has the opportunity to petition the holding and ultimately the opportunity to appeal in federal court.

Applicants also submit that it would seem contrary to restriction principles to require them to seek another, separate patent (which might be ultimately be subject to a different patent term and/or ultimately be assigned to a different owner) to obtain claim coverage for a broader "subcombination" (e.g., Claim 18) which has within its scope the SAME product (e.g., a composition comprising the compound of Claim 17, famoxadone and metalaxyl) covered by claims more narrowly covering the "combination" elected by Applicants (e.g. Claim 30).

Claim 18 is directed to a composition comprising a compound of formula I and (b2) at least one compound selected from the group consisting of compounds acting at the bc<sub>1</sub> complex of the fungal mitochondrial respiratory electron transfer site. Claim 17 is directed to a species of the genus of compounds of Formula I and famoxadone. Claim 30 which depends from Claim 7 recites the combination of the compound of Formula I (recited in claim 17), famoxadone and metalaxyl. Applicant appears to not appreciate the provision of the lack of unity rules which requires that the same special technical feature link the claims. Claims 18, 17 and 30 do not share a special technical feature.

Applicants also note that certain combinations of component (a) compounds and (b2) compounds have been illustrated to exhibit synergy (see Table A). As noted above, new claims 29 and 31 have been added and as recited therein specifically relates to synergy in



connection with Claim 7 compositions and Claim 30 compositions, respectively (i.e., compositions included in elected group III). (page 9, response of October 20, 2008)

It is clear from the above that not all combinations of component (a) and (b2) exhibit synergy. To the extent that synergy can be considered a special technical feature it would link those claims in which it is recited. A claim which broadly recited combinations of component (a) with (b2) would potentially still lack a special technical feature as those combinations lacking synergy would lack either novelty or an inventive step. However, it is clear that in the fungicide art obtaining combinations which are synergistic is a matter of routine experimentation and does not reflect an unexpected result (see Berezna at columns 68-70).

Applicants note that Section 1893.03(d) indicates that when making a lack of unity of invention requirement, the examiner must (in addition to listing the different groups of claims) explain why each group lacks unity with each other group, specifically describing the unique special technical feature in each group.

To the extent that the passage indicates that the examiner must identify a technical feature linking the claims in each of the groups and identify why they lack unity with each other the passage is correct.

Applicants submit that no sufficient basis has been identified in the Office Action for the separate grouping of groups I, IV and VIII.

Groups I and IV do not require that the composition exhibit any synergistic activity and on that basis lack unity with Group VIII. This point was discussed in the interview and has been noted by applicant in his response. Therefore, the examiner has distinguished between Groups (I and IV) and VIII. Claims 1 and 18 are in a genus and subgenus relationship. However, both claims are independent claims. It has been argued with respect to claim 1 that it is obvious over the art and the same line of argument is applicable to claim 18. Thus, neither claim appears to have a special technical feature based on the current record. However, this conclusion is subject to review should a different fact pattern appear. For example, facts demonstrating the unobviousness of claim 18 would result in its having a special technical feature without leading to the conclusion that claim 1 does also.

Applicants also submit that no sufficient basis has been identified in the Office Action for the separate grouping of groups II, VII and IX. More particularly, the description provided for groups VII and IX do not appear to distinguish from each other or Group II (although, as mentioned above, during the telephone conference of October 15 Examiner Woodward suggested in connection with Claim 24 that synergy can be considered a "special technical feature" worthy of separate grouping).

Applicant is initially referred to the analysis of claim 1 presented above with regard as to what its special technical feature is and the analysis provided by the examiner in the original lack of unity. In setting forth the original groups the examiner was in effect regarding all the limitations of the dependent claim into claim 1. That is, for Group II, claim 1 was considered to be the claim resulting from reading the limitations of claim 6 into it with the proviso that a specific combination of (b1) & (b3)-(b9) be selected. The requirement for a specific combination of (b1) & (b3)-(b9) was an overly succinct manner of stating that Group II lacked unity with itself. As argued above the prior art suggests combining fungicides and there is nothing of record to suggest that any particular combination is unobvious. Claim 22 has been cancelled which makes Group VI moot as the group was claim 18 with all the limitations of claim 22. Claim 6 of Group II and claim 26 of Group IX stand in relationship to each other as do claims 1 and 18 in the preceding paragraph and lack unity on the same basis.

Applicants also submit that it would seem contrary to restriction principles to require them to seek another, separate patent (which might be ultimately be subject to a different patent term and/or ultimately be assigned to a different owner) to obtain claim coverage for a "combination" (e.g., Claim 21) which has within its scope the SAME product (e.g., a composition comprising the compound of Claim 17, famoxadone and metalaxyl) covered by claims of a different scope covering the same "combination" elected by Applicants (e.g., Claim 7).

Applicant's remarks reflect a traditional US restriction practice mindset. However, the instant application is subject to restriction under lack of unity practice. As such and as noted above, the issue is whether or not the independent claims share the same special technical feature with each other and similarly for dependent claims in the absence of a special technical feature in the independent claims. With regard to claims 21, 17 and 7 they do not share the same special technical feature.

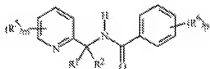
Applicants note that many of the claims now pending that involve the combination of component (a) and component (b2) (e.g., Claim 1 and Claim 18) have already been examined together. Applicants submit that no adequate basis has been identified to now separate these claims for examination in different groups and no serious burden has been

identified in connection with continuing consideration of the claims already properly examined (compare MPEP Section 803).

Applicant's statement is disingenuous as it suggests the genus of compounds of component (a) and the genus of compounds of (b2) have been examined. This is not the case as the examination has been limited to the component (a) of claim 17 and famoxadone as (b2) with metalaxyl as a third component. The examiner has provided ample evidence regarding the lack of a special technical feature linking all of the pending claims.

**It is noted that applicant could have elected Group I for prosecution on the merits. Such an election would have afforded applicant the most expeditious route to appeal as the entire examination process would have centered on the obviousness of the combination of the compound of claim 17 in combination with famoxadone. If applicant were to prevail on the issue it would necessarily result in a re-evaluation of the holding of lack of unity.**

2. Claim 29 is drawn to the composition of claim 7 comprising a synergistic combination of the compound of the formula:



wherein  $(R^3)_{m1}$  is 3-Cl-5- $\text{CF}_3$ ,  $R^1$  is H,  $R^2$  is H, and  $(R^6)_p$  is 2,6-di- $\text{CF}_3$ , and famoxadone.

Synergy or the limitation of a composition comprising a synergistic combination can be considered a separate technical feature, and is not recited in claims 1, 6, and 7 of elected Group III. Therefore, claims requiring synergy or the limitation of a composition comprising a synergistic combination do not share the same technical feature with elected Group III, and claims 29-31 are not linked to the claims of Group III.

3. Claims 2, 4-5, 9, 11, 17, 18, 20, 21, and 24-31 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected inventions, there being no allowable generic or linking claim.
4. Claims 1, 6, and 7 are included in the prosecution.

**Provisional rejection of claims under obviousness-type double patenting**

5. In light of the abandonment of Application No. 10/501,122 and Application No. 10/501,853, the provisional rejection under obviousness-type double patenting of 12/12/07 is withdrawn.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 1, 6, and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Moloney et al. (US 6,503,933) in view of Berezna et al. (US 6,066,638), and further in view of Jordan et al. (Pesticide science 55:105-118 (1999)).

The elected invention is a composition for controlling plant diseases caused by fungal plant pathogens comprising: (a) at least one compound of formula I of claim 1, N-oxides and agriculturally suitable salts thereof



wherein

A is a substituted pyridinyl ring;

B is a substituted phenyl ring;

W is C=L or SO<sub>2</sub>;

L is O or S;

R<sup>1</sup> and R<sup>2</sup> are each independently H; or C<sub>1</sub>-C<sub>6</sub> alkyl, C<sub>2</sub>-C<sub>6</sub> alkenyl, C<sub>2</sub>-C<sub>6</sub> alkynyl or C<sub>3</sub>-C<sub>6</sub> cycloalkyl, each optionally substituted;

R<sup>3</sup> is H; or C<sub>1</sub>-C<sub>6</sub> alkyl, C<sub>2</sub>-C<sub>6</sub> alkenyl, C<sub>2</sub>-C<sub>6</sub> alkynyl, C<sub>3</sub>-C<sub>6</sub> cycloalkyl, C<sub>2</sub>-C<sub>10</sub> alkoxyalkyl, C<sub>2</sub>-C<sub>6</sub> alkylcarbonyl, C<sub>2</sub>-C<sub>6</sub> alkoxy carbonyl, C<sub>2</sub>-C<sub>6</sub> alkylaminocarbonyl or C<sub>3</sub>-C<sub>8</sub> dialkylaminocarbonyl; and

n is 1 or 2; and

(b) a compound acting at the bc<sub>1</sub> complex of the fungal mitochondrial respiratory electron transfer site; and optionally at least one compound selected from the group consisting of (b1), (b3)-(b9).

Applicant elected the compound of claim 17 (2,6-dichloro-N-[[3-chloro-5-(trifluoromethyl)-2-pyridinyl]methyl]benzamide) as a species of component (a), famoxadone as a species of component (b2), and metalaxyl as a species of component (b6) in the reply filed on October 20, 2008.

Moloney discloses compounds that are phytopathogenic fungicides with the same structure as formula I of the instant application. Formula I of Moloney has substituents that are included in part (a) of Formula I of the instant application (Col. 1, lines 7-50). Component (a) of Formula 1, as disclosed in instant claim 17, is 2,6-dichloro-N-[[3-chloro-5-(trifluoromethyl)-2-pyridinyl]methyl]benzamide, is disclosed by Moloney in Col. 9, Table 1, Compound 21.

Moloney does not expressly teach component (b2) a compound acting at the bc<sub>1</sub> complex of the fungal mitochondrial respiratory electron transfer site, or component (b6) a phenylamide fungicide.

Bereznak teaches fungicidal pyrimidinones. An example of an "agricultural protectant" is 5-methyl-5-(4-phenoxyphenyl)-3-phenylamino-2, 4-oxazolidinedione (Col. 69, lines 61-63). This compound can be mixed with fungicidal pyrimidinones "for better control of plant diseases caused by fungal plant pathogens" (Col. 69, lines 51-52). This compound is famoxadone. Bereznak also teaches metalaxyl as fungicides that can be mixed with one or more other fungicides for an even broader spectrum of agricultural protection (Col. 68, lines 57-64 and Col. 69, lines 26 and 60).

As Jordan teaches, famoxadone is an inhibitor of "mitochondrial electron transport, specifically inhibiting the function of the enzyme ubiquinol:cytochrome c oxidoreductase (cytochrome bc<sub>1</sub>) (Abstract). Jordan also teaches that metalaxyl is a known fungicide (Page 112, left hand column, under 3.1 Early mode of action studies on fungicide 1).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use 2,6-dichloro-N-[[3-chloro-5-(trifluoromethyl)-2-pyridinyl]methyl]benzamide, as disclosed by Moloney, and combine it with the "agricultural protectant" famoxadone (5-methyl-5-(4-phenoxyphenyl)-3-phenylamino-2, 4-oxazolidinedione) and the fungicide metalaxyl, as taught by Bereznak and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because the composition of formula I(a) as taught by Moloney, can include additional active ingredients such as compounds with fungicidal properties (Moloney, Col. 3, lines 29-32). Metalaxyl is a known fungicide, as evidenced by Bereznak (Col. 68, lines 57-64 and

Col. 69, lines 26 and 60) and Jordan (Page 112, left hand column, under 3.1 Early mode of action studies on fungicide 1). Furthermore, Bereznaк also teaches the advantage of combining compounds with fungicidal properties as having "an even broader spectrum of agricultural protection" (Col. 68, lines 58-64).

Regarding instant claims 1, 6, and 7, the composition comprising components (a), (b2), and (b6) would have been obvious over the 2,6-dichloro-N-[[3-chloro-5-(trifluoromethyl)-2-pyridinyl]methyl]benzamide (component (a)), as disclosed by Moloney (Col. 9, Table 1, Compound 21), in view of the combination of this component with an "agricultural protectant" famoxadone (5-methyl-5-(4-phenoxyphenyl)-3-phenylamino-2, 4-oxazolidinedione), and the fungicide metalaxyl, as taught by Bereznaк (Col. 69, lines 26, 51-52, and 60-63, Col. 68, lines 57-64).

Regarding instant claim 7, the weight ratio of component (b) to component (a) that is from 30:1 to 1:30 and the weight ratio of component (b2) to component (a) that is from 10:1 to 1:1 would have been obvious to one with ordinary skill in the art because during the process of routine experimentation, titration of various levels of components would be carried out in order to optimize the efficacy of the composition in controlling fungal pathogens in plants.

### ***Conclusion***

8. No claims are allowed.
9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Aradhana Sasan whose telephone number is (571) 272-

9022. The examiner can normally be reached Monday to Thursday from 6:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward, can be reached at 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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